# STATE OF MICHIGAN

# COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JAMES NELSON CLARK, JR.,

Defendant-Appellant.

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UNPUBLISHED
September 24, 2002

No. 232237
Wayne Circuit Court
LC No. 99-007322

Before: Fitzgerald, P.J., and Bandstra and Gage, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of assault with intent to do great bodily harm, MCL 750.84, and was sentenced to a prison term of five to ten years. Defendant appeals as of right. We affirm.

Defendant first argues that the trial court, through an instruction to the jury during jury selection, expressly foreclosed the possibility of having testimony reread during deliberations. According to defendant, these remarks had the effect of improperly preventing the jury from even asking to review testimony. Defendant's failure to object to the trial court's instruction forfeits this claim unless defendant demonstrates outcome-determinative plain error. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

The decision whether to allow a jury to reexamine selected testimony is left to the sound discretion of the trial court. *People v Carter*, 462 Mich 206, 218; 612 NW2d 144 (2000), citing MCR 6.414(H) and *People v Howe*, 392 Mich 670, 675; 221 NW2d 350 (1974). A trial court must exercise its discretion to assure fairness and to refuse unreasonable requests to review certain testimony or evidence; but, it cannot simply refuse to grant the jury's reasonable request. MCR 6.414(H); *Howe*, *supra* at 676. However, the court may order the jury to deliberate further without the requested review, so long as the possibility of having the testimony or evidence reviewed at a later time is not foreclosed. MCR 6.414(H).

This case does not involve a decision whether to grant the jury's request to have certain testimony reread, since the jury never made such a request. Rather, defendant argues that the trial court effectively prevented the jury from requesting to have testimony reread. To the extent that the trial court gave the jury the impression that any review of testimony was flatly foreclosed, the court erred. However, because there was no objection from the defense, because the comment was made before trial began and not at the time of final jury instructions or

following a request to have certain testimony reread, and because there is no indication that the jury ever wished to review testimony, we conclude that defendant has failed to demonstrate outcome-determinative plain error. *Carines, supra.*

Defendant next argues that the evidence was insufficient to support defendant's conviction. Specifically, defendant contends that there was insufficient evidence of defendant's intent. In reviewing the sufficiency of the evidence, we view the evidence in the light most favorable to the prosecution to determine whether a rational trier of fact could conclude that the essential elements of the crime were proven beyond a reasonable doubt. *People v Johnson,* 460 Mich 720, 723; 597 NW2d 73 (1999).

The offense of assault with intent to do great bodily harm requires proof of an attempt or offer with force or violence to inflict physical harm to another (physical assault) coupled with the intent to do great bodily harm less than murder. *People v Smith*, 152 Mich App 756, 761; 394 NW2d 94 (1986). A defendant's intent may be inferred from the words, actions, or means used in the crime, *People v Hawkins*, 245 Mich App 439, 458; 628 NW2d 105 (2001), through minimal circumstantial evidence. *People v Bowers*, 136 Mich App 284, 297; 356 NW2d 618 (1984). Satisfactory proof of intent may be established by reasonable inferences drawn from the facts in evidence. *People v McRunels*, 237 Mich App 168, 181; 603 NW2d 95 (1999). A defendant's deliberate act of physical assault permits an inference of intent. *Id*. at 181-182. Here, the victim's testimony that "Senior" and "Tyrone" beat the victim for several minutes and struck him with a crowbar, that defendant arrived and laughed as the others beat the victim, and that defendant eventually joined the others in beating the victim was sufficient to permit a rational trier of fact to find beyond a reasonable doubt that defendant intended to cause the victim great bodily harm.

Defendant next argues that the trial court erred in denying his motion to quash the assault with intent to murder charge because insufficient evidence of an intent to kill was presented. A circuit court's decision to grant or deny a motion to quash charges is reviewed de novo to determine if the district court abused its discretion in binding over a defendant for trial. *People v Jenkins,* 244 Mich App 1, 14; 624 NW2d 457 (2000). Generally, the standard for reviewing a decision for an abuse of discretion is narrow, the result must have been so violative of fact and logic that it evidences a perversity of will, a defiance of judgment, or an exercise of passion or bias. *People v Torres (On Remand),* 222 Mich App 411, 415; 564 NW2d 149 (1997).

Probable cause that the defendant has committed the crime is established by evidence sufficient to cause a person of ordinary prudence and caution to conscientiously entertain a reasonable belief of the defendant's guilt. *People v Justice (After Remand),* 454 Mich 334, 344; 562 NW2d 652 (1997). To establish that a crime has been committed, a prosecutor need not prove each element beyond a reasonable doubt, but he must present some evidence of each element. *People v Hill*, 433 Mich 464, 469; 446 NW2d 140 (1989); *People v Reigle*, 223 Mich App 34, 37; 566 NW2d 21 (1997). Circumstantial evidence and reasonable inferences from the evidence can be sufficient. *People v Terry*, 224 Mich App 447, 451; 569 NW2d 641 (1997). After a thorough review of the transcript of the preliminary examination, we find no abuse of discretion in the magistrate's conclusion that there was sufficient evidence produced at the preliminary examination to support the assault with intent to murder charge.

Defendant also argues that the prosecution did not establish independent evidence of a conspiracy to trigger the hearsay exception of MRE 801(d)(2)(E) and allow into evidence a statement made by Senior. We disagree. The victim testified that after being severely beaten by Senior, Tyrone, and others, defendant arrived and stated, "Look at that bitch." Defendant then watched and laughed as the others continued to beat the victim. Defendant then kicked the victim and stomped on him. The testimony established that defendant did combine with Tyrone and Senior, among others, to commit an unlawful act. See *People v Atley*, 392 Mich 298, 310; 220 NW2d 465 (1974), overruled in part on other grounds in *People v Hardiman*, 466 Mich 417, 428; ___ NW2d ___ (2002).. The circumstances and conduct of the parties (defendant joining an ongoing beating of the victim) also established agreement in fact. *Id.* at 311. Although defendant joined late, he did not have to participate in all aspects of the conspiracy. *People v Taurianen*, 102 Mich App 17, 32; 300 NW2d 720 (1980). Defendant's intent to combine with others and his intent to accomplish the unlawful objective of beating the victim, *People v White*, 147 Mich App 31, 36; 383 NW2d 597 (1985), could be inferred from his actions and statement and his demeanor. *Atley*, supra at 311. Thus, the prosecution established defendant's intent to combine with others and intent to accomplish the illegal objective by a preponderance of the evidence, *People v Rockwell*, 188 Mich App 405, 408; 470 NW2d 673 (1991), and Senior's statement was properly admitted.

Last, defendant contends that the trial court erroneously scored offense variable 1 (OV 1) and offense variable 7 (OV 7). We review a trial court's scoring of sentencing variables for an abuse of discretion. *People v Milton*, 186 Mich App 574, 577; 465 NW2d 371 (1990). Because this offense occurred before January 1, 1999, the judicial sentencing guidelines apply. Generally, appellate review of guidelines scoring calculations is very limited. *People v Daniels*, 192 Mich App 658, 674; 482 NW2d 176 (1992). Sentencing judges have the discretion to assess points on each variable; the points assessed will be upheld on appeal where at least some evidence in the record supports the score. *Id.* Moreover, appellate courts will offer relief only where

> (1) a factual predicate is wholly unsupported, (2) a factual predicate is materially false, and (3) the sentence is disproportionate. [*People v Mitchell*, 454 Mich 145, 177; 560 NW2d 600 (1997).]

This Court will not grant relief absent the establishment of all three of the above factors. *People v Peerenboom*, 224 Mich App 195, 202; 568 NW2d 153 (1997). Because defendant failed to address these relevant factors, and because there is evidence in the record to support each disputed score, we reject defendant's argument.

Affirmed.

/s/ E. Thomas Fitzgerald
/s/ Richard A. Bandstra
/s/ Hilda R. Gage